

COMMONWEALTH OF MASSACHUSETTS

NANTUCKET, ss

DISTRICT COURT DEPARTMENT
DOCKET NO. 1888CR000598

COMMONWEALTH
vs.
KEVIN S. FOWLER

FILED

JAN 07 2019

NANTUCKET DISTRICT COURT

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO PRESERVE DIGITAL AND EXCULPATORY EVIDENCE

I. INTRODUCTION

Mr. Fowler is charged with a single count of indecent assault and battery without consent in violation of G.L. c. 265, § 13H. Specifically, the government alleges that Mr. Fowler assaulted [REDACTED] at the Club Car restaurant and bar two-and-a-half years ago, on or about July 7, 2016. In spite of the very public nature of these allegations, no witnesses from the crowded bar have come forward to corroborate Mr. [REDACTED]'s claims of assault. According to police reports, Mr. [REDACTED] exchanged numerous text messages and Snapchats with his then-girlfriend, M.D., concerning his interactions with Mr. Fowler on the night in question, but never mentioned the alleged sexual assault. Although the Commonwealth has known about the existence of this information for more than a year, this critical evidence has not been collected or preserved by the police.¹ Mr. [REDACTED] and M.D.'s cell phones and cloud-based accounts unquestionably contain highly relevant and exculpatory information, the destruction or deletion of which would

¹ The Commonwealth has produced only a single video from the night in question, which does not support their claim of indecent assault and battery.

irreparably harm Mr. Fowler's ability to defend himself against these patently false allegations.

As set forth herein, Mr. Fowler respectfully requests that this Court issue an order immediately preserving Mr. [REDACTED] and M.D.'s cell phones and cloud-based accounts for future examination by the defense.

II.
STATEMENT OF FACTS

In July 2016, Mr. [REDACTED] was employed as a busboy at the Club Car on Nantucket Island. Following his shift on July 7, 2016, Mr. [REDACTED] sought out a friend for the specific purpose of introducing him to Mr. Fowler, who was a patron at the restaurant that evening. Upon meeting Mr. Fowler, Mr. [REDACTED] created an entirely false persona. He claimed he was a 23-year-old college student studying business at Wake Forest University. In fact, aside from his name, everything Mr. [REDACTED] told Mr. Fowler was a lie. In point of fact, Mr. [REDACTED] was 18 years old, not in college and had taken a summer job bussing tables on the Island. According to Mr. [REDACTED]'s statement in the police report, he welcomed drinks from Mr. Fowler, let Mr. Fowler put his arm around him near the piano while they did "sing-alongs," and even left the bar with him to smoke a cigarette after giving Mr. Fowler his phone number. At best, this describes two people engaged in mutual and consensual flirtation, nothing more.

Mr. [REDACTED]'s unsubstantiated, after-the-fact claims of sexual assault are patently false. Mr. [REDACTED] alleges that, following their cigarette break, he accompanied Mr. Fowler back inside to the crowded piano bar. There, according to Mr. [REDACTED]'s claim, Mr. Fowler purportedly reached behind his own back, placed his hand inside Mr. [REDACTED]'s pants and rubbed his un-erect penis for

three minutes. Significantly, not a single witness from the bar, which was at capacity that night, substantiates this claim.²

Moreover, Mr. [REDACTED]'s admitted actions during and immediately after the purported three-minute encounter are completely inconsistent with a victim of sexual assault. By Mr. [REDACTED]'s own account, he did not object to the alleged touching, he did not ask Mr. Fowler to stop, and he did not in any way remove himself from the situation. Instead, according to Mr. [REDACTED], his reaction was to text and video Snapchat his girlfriend, M.D., *while Mr. Fowler was supposedly assaulting him*. The only physical evidence produced by the Commonwealth in this case is a single fraction-of-a-second video purportedly taken by Mr. [REDACTED]. Notably, this video does not show anything that could be remotely described as assaultive behavior, and it therefore does not support the prosecution's claim of indecent assault and battery. When Mr. Fowler excused himself from the piano bar to go to the restroom, Mr. [REDACTED] left the bar.

According to the police reports, Mr. [REDACTED] and M.D. exchanged texts, calls, and Snapchats during the course of the approximately one-hour encounter. According to M.D., Mr. [REDACTED] was contemporaneously reciting via text messages and Snapchats the events of the evening as it progressed. Although M.D. recounted in her statement that Mr. [REDACTED] apprised her of nearly all of the interactions between the two men during the course of their encounter, Mr. [REDACTED] never suggested that he had in any way been sexually assaulted. Further, according to M.D.'s statement to police, she received a telephone call and additional text messages from Mr. [REDACTED] immediately following his departure from the Club Car that night. Again, M.D. indicated to the police that Mr. [REDACTED] made no allegation of sexual assault. Rather, she told the police that Mr. [REDACTED] was

² In spite of the high-profile nature of these allegations, and the fact that the complaining witness' mother, Heather Unruh, has taken the unusual step of investigating and attempting to interview witnesses herself, no one has come forward to substantiate or corroborate Mr. [REDACTED]'s claims.

simply drunk. Indeed, according to M.D.—the person Mr. [REDACTED] was in constant communication with during the evening in question—the *first time* she ever heard the allegations of sexual assault was when she saw the now-infamous press conference that Mr. [REDACTED]’s mother, Heather Unruh, undertook with her civil lawyer more than one year later.³

III.

THE CELL PHONES AND CLOUD-BASED DATA CONTAIN RELEVANT AND EXCULPATORY INFORMATION AND MUST BE PRESERVED

The federal constitutional guarantee of due process makes clear that a defendant has the right to a fair opportunity to defend against the State’s accusations. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) Although the prosecution does not have an affirmative duty to collect evidence, due process requires that the prosecution disclose to a defendant any exculpatory evidence in its possession. *Commonwealth v. Lapage*, 435 Mass. 480, 488 (2001). “This obligation includes ‘evidence which provides some significant aid to the defendant’s case, whether it furnishes corroboration of the defendant’s story, calls into question a material, although not indispensable, element of the prosecution’s version of the events, or challenges the credibility of a key prosecution witness.’” *Commonwealth v. Skipps*, 399 Mass. 820, 835 (1987).

Additionally, state discovery statutes mandate the disclosure of, *inter alia*, material and relevant police reports, photographs, and other tangible evidence in the government’s possession. See Mass. Rules of Crim. P., Rule 14(a)(1)(A). Understanding that certain information that would otherwise be subject to this mandatory disclosure requirement may not be in the possession of law enforcement, the Legislature created a mechanism to ensure the preservation of that evidence:

- (i) Upon receipt of information that any item described in [Rule 14(a)(1)(A)] exists, except that it is not within the possession, custody or control of the prosecution . . .

³ M.D. also told police that both of their groups of friends would joke with Mr. [REDACTED] about being hit on by Mr. Fowler, and that it never seemed to bother him.

the prosecution shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item's location and the identity of any persons possessing it. (ii) At any time, a party may move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon the motion expeditiously.

Mass. Rules of Crim. P., Rule 14(a)(1)(E). Thus, the Legislature sought to ensure that (1) the defense is made aware of potentially significant evidence known to the prosecution; and (2) to prevent the destruction of relevant evidence so that a subsequent defense subpoena may be effective. See *id.*

Here, according to the police reports, Mr. [REDACTED] and M.D. exchanged numerous text messages, phone calls, and Snapchats concerning Mr. [REDACTED]'s interactions with Mr. Fowler on the evening in question. Those text messages, phone call records, and Snapchat records are material and relevant to this case and, if in the possession of the prosecution, would be subject to mandatory disclosure under Rule 14(a)(1)(A)(vii). To date, the Commonwealth has produced only a single video, which was purportedly taken from Mr. [REDACTED]'s cell phone.⁴ Clearly, other relevant and exculpatory tangible evidence remains in Mr. [REDACTED] and M.D.'s possession. That information is crucial to Mr. Fowler's defense. Any text messages and Snapchats sent during and after the alleged incident are relevant to the issue of consent and whether lack of consent was fairly communicated to Mr. Fowler. Additionally, text messages consistent with statements provided to law enforcement are likely to reveal that Mr. [REDACTED] joked about the incident with friends for months after the incident and that his mother is the driving force behind these allegations. This is exactly the type of material and relevant information Rule 14(a)(1)(E) was meant to protect. Accordingly, Mr. [REDACTED] and M.D.'s cell phones and associated cloud-based

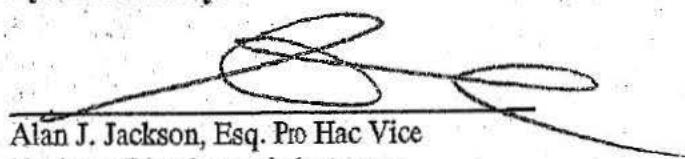
⁴ To the extent that the Commonwealth is in possession of additional tangible evidence, Mr. Fowler requests that this information be produced immediately.

accounts must be preserved until such time as a qualified defense expert can make a forensic digital copy of the phones and search for this relevant information. Mr. Fowler further requests the preservation of any access codes and/or passwords needed to access the content of the phones and/or cloud-based information. Such an analysis will only be possible if the contents of the phones and access to them are preserved now.

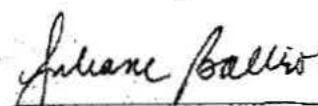
IV.
CONCLUSION

For the foregoing reasons, Mr. Fowler respectfully requests that this Court issue an order preserving Mr. [REDACTED] and M.D.'s cell phones and cloud-based accounts for future inspection by the defense.

For The Defendant:
By His Attorneys



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Dated: January 7, 2019

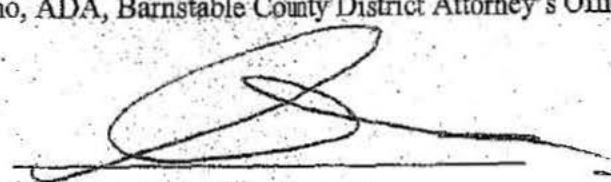
ORDER

The above and foregoing motion is hereby GRANTED/DENIED

By:

CERTIFICATE OF SERVICE

I, Alan Jackson, hereby certify that I have served the *Defendant's Memorandum of Law In Support of Motion To Preserve Digital And Exculpatory Evidence*, by delivering a copy of same, in hand, to Michael Giardino, ADA, Barnstable County District Attorney's Office, on January 7, 2019.



Alan J. Jackson, Esquire

COMMONWEALTH OF MASSACHUSETTS

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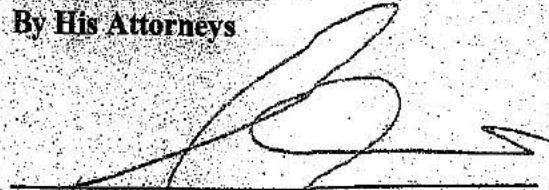
DEFENDANT'S MOTION TO PRESERVE DIGITAL AND EXCULPATORY EVIDENCE

Defendant Kevin S. Fowler, by and his through counsel of record, Alan J. Jackson of Werksman Jackson & Quinn LLP, moves this Court for an order to preserve the cell phones and associated cloud-based data of the complaining witness, [REDACTED], and his former girlfriend, M.D., which contain exculpatory information. This Motion is made on the basis that an order is necessary to prevent the possible destruction, deletion or manipulation of highly relevant and exculpatory evidence. Accordingly, defense counsel seeks the immediate preservation of (1) any and all cell phones used by [REDACTED] and M.D. between July 7, 2016 and present; (2) any and all cloud-based accounts associated with the respective cell phones during the pertinent time period; and (3) preservation of the access codes and/or passwords needed to access the content of the phones and/or cloud-based information.

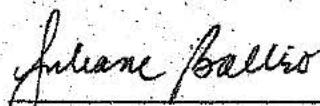
*Att'd. through and
July 7, 2016 and including June 7, 2019
Barrett
1/7/19*

In support of the within motion counsel for the Mr. Fowler directs this Court's attention to the memorandum of law and Affidavit of Alan J. Jackson filed herewith.

Respectfully submitted,
For The Defendant:
By His Attorneys



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Dated: January 7, 2019

CERTIFICATE OF SERVICE

I, Alan Jackson, hereby certify that I have served the *Defendant's Motion To Preserve Digital And Exculpatory Evidence*, by delivering a copy of same, in hand, to Michael Giardino; ADA, Barnstable County District Attorney's Office, on January 7, 2019.

Alan Jackson, Esquire

COMMONWEALTH OF MASSACHUSETTS

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1/7/19

NANTUCKET, ss

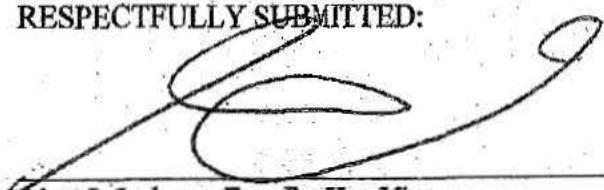
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THE COMMONWEALTH OF }
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vs. }
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_____ }

NOTICE OF APPEARANCE

Kindly enter my appearance on behalf of the Defendant, Kevin S. Fowler, in the above
entitled matter.

RESPECTFULLY SUBMITTED:



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January 7, 2019

COMMONWEALTH OF MASSACHUSETTS

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NANTUCKET DISTRICT COURT

AFFIDAVIT OF ALAN J. JACKSON, ESQ., IN
SUPPORT OF MOTION TO PRESERVE DIGITAL AND EXCULPATORY
EVIDENCE

I, Alan J. Jackson, Esq., under oath do depose and state as follows:

1. I represent the Defendant, Kevin S. Fowler, Pro Hac Vice.
2. I submit this affidavit in support of Defendant's Motion to Preserve Digital and Exculpatory Evidence (hereafter "Motion to Preserve").
3. I have carefully reviewed the discovery produced by the Commonwealth in this matter, including all police reports and video evidence.
4. I did not attach a true and complete copy of the police reports or video referenced in the Motion to Preserve out of concern for the privacy of the persons whose names and other identifying information appear in those reports. A copy of these reports can be provided to the court upon request under seal.
5. I believe that the factual assertions and reasonable inferences set forth in the Motion to Preserve fairly reflect the statements summarized in the police reports and the content of the video produced.

6. It is my opinion that preservation of the cell phones and cloud-based accounts of the complaining witness, [REDACTED] and his former girlfriend, M.D., is necessary to prevent the destruction of exculpatory evidence. According to the police reports, Mr. [REDACTED] and M.D. used their phones to communicate contemporaneously concerning the alleged assault on July 7, 2017 and immediately thereafter. Preservation of the evidence contained on these cell phones is necessary to effectively defend my client against the pending charges.

7. Preservation of the access codes and passwords related to the respective cell phones and cloud-based accounts is necessary so that a forensic digital copy of the text messages, snapchats or other forms of communication may be obtained at a future date. Forensic analysis of the cell phones is likely to reveal exculpatory evidence because the complainant was sending contemporaneous messages to his ex-girlfriend, M.D. throughout the night and, according to M.D., never mentioned being sexually assaulted.

8. Preservation of the cloud account contents of both Mr. [REDACTED] and M.D. is necessary because the allegations date back to July 7, 2016. Because of the significant passage of time, text messages and Snapchats that are not still on the phones may exist in a cloud-based storage account.

9. Any text messages and Snapchats sent during and after the alleged incident are relevant to the issue of consent and/or whether lack of consent was fairly communicated to the Defendant. Text messages consistent with statements provided to law enforcement are likely to reveal that the complainant joked about the incident with his friends for months after the incident, and that his mother is a driving force behind the emergence of the allegations.

10. Accordingly, I believe the preservation of the cell phones and cloud-based accounts of Mr. [REDACTED] and M.D. is not only appropriate, but necessary to ensure the preservation of exculpatory evidence.

SIGNED and SWORN to under the pains and penalties of perjury this 7th day of January, 2019.



Alan J. Jackson, Esq.